Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

Stan K. Buck,

Petitioner,

v.

Ogden Deseret Industries/Welfare Services, et al.,

Respondents.

Petition For Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Petition For Writ of Certiorari

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April 10, 2000

QUESTION # 1

A worker has an industrial accident and properly petitions the state administrative agency prior to going to back surgery, to conduct an investigation. The agency neglects any action for 8 months, and fails to notify the EEOC of the ADA claim. The claim lays dormant as the employer remains silent until shortly prior to the statute of limitations when the claimant files charges in the state court because of inaction by the administrative agencies. Will the disabled worker's rights of Due Process and Equal Protection be violated if the Commission's error is allowed to extinguish his cause of action?

QUESTION # 2

An injured worker files suit in state court days before the federal statute of limitations in a labor dispute. The administrative agencies refuse to issue a Right To Sue letter prior to an investigation. The court allows the case to lay dormant while waiting for a mandatory Right To Sue Letter. The employer remains silent to the state and federal administrative agencies for thirty three months combined, and the **state court dismisses all the federal claims without prejudice**. Is the employee entitled to summary judgment on the mandate of presumption due to the employer's continued silence?

QUESTION # 3

A claim for breach of duty of care is ordered to proceed in state court. The court clerk fails to update the docket during discovery for 75 days, or provide any other communications, causing confusion. The plaintiff fails to respond to the defense counsel and the court dismisses the negligence claim. Is it a constitutional error to fail to update the docket and deny the injured employee an opportunity to have a hearing on the merits, if the court allows summary judgment in a negligence case?

QUESTION # 4

The Utah Anti-Discrimination Division (UADD) and EEOC wait thirty three months for the employer to give a position statement and furnish supporting documents. The employer remains silent. The employee receives the Right To Sue letter 8 days prior to the state court's Summary Judgment of negligence and wrongful termination claims. **The state court dismisses federal labor claims without prejudice** due to the lack of a Right To Sue letter. Will the plaintiff/employee lose his federal Civil Rights, on the principle of res judicata, because he took the charges into federal court, being unable to prepare and **submit charges to the state court in less than 30 days from the administrative agency notice?**

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court below were plaintiff-petitioner, Stan K. Buck, and the defendants-respondents, the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints, erroneously named Ogden Deseret Industries/L.D.S. Welfare Services.

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OPINIONS BELOW

The unreported opinion of the Tenth Circuit Court of Appeals is reproduced in the Appendix (App.) at App. 1 through 3. The unreported opinion on res judicata from the United States Federal District Court for the state of Utah is reproduced at App. 4 through 13.

The unreported opinion of Summary Judgment on Negligence claims that was adopted by the Utah State Court of Appeals is reproduced at App. 14 through 17.

The unreported Decision of Summary Judgment on Negligence claims by the State of Utah 2nd Judicial District Court of Weber County is reported in App. 17 through 23.

There was no hearing nor any investigation at either the state UADD or the EEOC in this ADA case.

The dismissal and unpublished reports by the administrative agencies which had original jurisdiction in this labor dispute are reproduced in the Appendix, UADD at App. 24 through 27; The EEOC at App. 28 through 36.

JURISDICTIONAL STATEMENT

Jurisdiction for the United States Federal District Court for the state of Utah was based upon 28 U.S.C. § 1251 et seq.; 42 U.S.C. § 2000e et seq. and 5 USCS §

706 et seq. of the Federal Administrative Procedures Act.

This Court has discretionary appellate jurisdiction under Article III Sec.2, of the Constitution, to review the case by authority of United States Code 28 § 1257 (1970) 28 USCA §§1291-1295 et seq.

The order of judgment of the Tenth Circuit Court of Appeals was entered November 8th 1999. A timely Petition for Rehearing was filed by Mr. Buck on November 18, 1999. Mr. Buck's Petition for Rehearing was denied on November 24, 1999. A copy of the order denying Mr. Buck's Petition for Rehearing is reproduced at App. 3.

STATUTORY PROVISIONS INVOLVED

This case involves the Americans With Disabilities Act 42 USC § 12101; 42 U.S.C. §§ 2000e et seq.; Section 706 of the Civil Rights Act of 1964; also the Equal Employment Opportunity Act of 1972, which governs the compliance of the Title I of ADA. Title II of the ADA, is enforced by the U.S. Justice Department, which prohibits discrimination in all state and local government programs and activities, including employment, after January 26, 1992.

In the Equal Employment Opportunity Act of 1972, Congress established an integrated, multi-step enforcement procedure, that procedure of the Act's overall enforcement structure begins when a charge is filed with the EEOC or state FEPA (Fair Employment

Practices agency) and culminating, if necessary, in the EEOC's authority to bring civil suit in federal court.

Under Section 1601.76 of the EEOC's regulation a claimant is entitled to have the EEOC perform a "Substantial Weight Review" of state agency findings from the charge of discrimination. In 1994 when Congress amended both the Rehabilitation Act [42 U.S.C. § 12202 (1994)] and the ADA [42 U.S.C. § 2000d-7 (1994)] which includes this litigation, it did not change those requirements, and prohibits states and federal agencies from violations of discrimination and expressly confers jurisdiction on federal district courts to prevent violations of those Acts.

STATEMENT OF THE CASE

Stan K. Buck, petitioner, is a 52 year old, partially disabled worker, who had been employed by the defendants approximately 11 years. He worked as a Sales Supervisor about two and a half years in the Ogden Deseret Industries store. Mr. Buck, commenced this action by filing a complaint with the Industrial Commission of the State of Utah, in April, 1995. The action stems from an industrial accident, that occurred in December, 1994. Mr. Buck, contends that the defendants were carelessly indifferent to a pre-existing back condition, where he had had previous back surgery in 1985. (See under Title VII of the ADA.[42 U.S.C. §1981a(b)(1); 42 U.S.C. § 12111(8, 9, 10).] See Nunes v.Wal-Mart Stores, Inc.,164 F.3d 1243 (9th Cir. 1999).

Mr. Buck's, surgery had been partially successful, but he had experienced several herniated dics in the 10 year period. The 1994 accident herniated the same disc again. Mr. Buck, further contends that in the middle of the busy Christmas rush the defendants refused to follow the doctor's directions, and forced performance with the threat of employment loss, which caused the herniated disc to again rupture, requiring additional surgery on July 27, 1995, which surgery caused additional disability. (See Davoll v.Webb, 943 F.Supp.1289,(D. Colo. 1996)).

Mr. Buck also alleges that the defendants wrongfully terminated his employment, April 21, 1995, when he involved the UADD because the defendants refused to follow doctor's instructions. Ransom v. State of Arizona Bd. of Regents., 983 F.Supp. 895 (D.Ariz. 1997). This termination was in violation of their own employment policies. See Welfare Services Personnel Administration Manual, § 4.14 "The Church encourages a policy of fair treatment of their employees. The employer should interview the employee in question and carefully investigate any mitigating facts or circumstances brought forth during that interview before making a final terminating decision."

ADMINISTRATIVE AGENCY INVOLVEMENT

One who alleges a violation of Title VII may not sue in federal district court until he has exhausted his administrative remedies,[42 U.S.C. §2000e-5(e)] in order to give states and localities an opportunity to combat discrimination free from premature federal

interventions. This gives the state or local agency the authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof. A review of the statutory regulation as set out in 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5 (f)(1) shows that the court gives no specific deadline by which time the EEOC must bring suit, but three specific time limitations are provided at various stages in the procedure: (1) the commission must wait 30 days from the filing of the charge before instituting suit (in an effort to secure a conciliation agreement) which suggests that an investigation must be in progress within 30 days; (2) if a conciliation agreement has not been reached or the EEOC has not filed suit within 180 days from the filing of such charge, the EEOC must notify the aggrieved party; and (3) the aggrieved party then has 90 days within which to file an action.

Pre-suit actions, by the petitioner, included all the proper notification and petitions for help required to be made to the UADD and EEOC,(reference UADD Case # W96-0053; EEOC # 35C960471 at the agencies) who had exclusive primary jurisdiction in this ADA labor dispute. Mr. Buck had filed a timely charge with the UADD and expected the agency to conduct an investigation, had they done so, they would have discovered that the defendants had either through ignorance, or neglect, violated the ADA (42 U.S.C. §12101) with Mr. Buck further back than the creation of the ADA in 1990. The UADD's general counsel claimed to have turned the case over to the EEOC, but failed to do so until 1 year after the agency's first notification. " If a charge has been initially filed with or referred to a state

or local agency, it must be filed with the EEOC within 300 days after the practice occurred or within 30 days after notice that the state or local agency has terminated its proceeding, whichever is earlier. See 706(e); Section 1601.23 of the Commission's regulations gives the requirement of notification to the claimant when conciliation efforts have failed, which was not done for **thirty three months**. This inaction makes the judicial process "unreasonably delayed", [42 USC. § 2000e-5(e)]. Here, the delay was not only inordinately long, but was caused in part by the agency's unexplained failure to properly conduct its investigation. The only justification offered by the EEOC for its delay is a general reference to its heavy, agency-wide workload.

This failure to act was also in violation of Utah law, see Utah Administrative Procedure Act section 63-46b-16(4)(a-b), which provides that a party who is substantially prejudiced by an agency's actions may seek judicial relief on the ground that the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied, or the agency has acted beyond the jurisdiction conferred by any statute. Although properly petitioned, the UADD and the EEOC, made no effort to forward an investigation, when the employer remained silent, even though both agencies have subpoena powers in the enforcement provisions. See 42 U.S.C.S. §§.- 2000e-8(a); 2000e-9.

The agencies also failed to notify the Mr. Buck of their failure to conciliate or negotiate.

The procedure of the Act's overall enforcement structure begins when a charge is filed with the state agency alleging that an employer has engaged in an unlawful employment practice, and then the EEOC or FEPA is directed to serve notice of the charge on the employer within 10 days of filing. The EEOC or FEPA is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true. This determination is made as promptly as possible and so far as practicable, not later than one hundred and eighty days from the filing of the charge.

The Senate Committee noted that the "primary concern should be to protect the aggrieved person's option to seek a prompt remedy," and that the purpose of the 180-day provision was to preserve "the private right of action by an aggrieved person". The final and conclusive confirmation from the Senate on the meaning of Section 706(f)(1), was: The retention of the private right of action, as amended

> **...is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission...does not act with due diligence and speed, accordingly, the provisions... allow the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution** [Emphasis added.]

The UADD neglected regulation, first, by not investigating the charge; secondly, by not properly notifying the EEOC in this ADA case; and third, by not giving the claimant any notice after the required 180

days as required by law. Well established law requires, that "When notice is a person's due, process which is mere gesture is not due process." (See Mullane v. Central Hanover Trust Co., 339 US 306, 94 L Ed 865, 70 S Ct 652, 1950).

The United States Supreme Court has concurred in their 1982 decision that such a failure in the administrative agencies would create two classes of claimants- "those who were processed within the 120 days following the filing of a claim and those whose claims were not processed within the 120 days and were accordingly terminated"- violated the Fourteenth Amendment right of the claimant to the equal protection of the laws, (See Logan v Zimmerman Brush Co. 455 US 422,71 Ed 2d 265, 102 S Ct 1148). Justice Blackmun delivered the opinion for the Rehnquist Court as **not being rationally related to the legitimate governmental objectives.** He further states: "**The availability of a post-termination tort action does not provide appellant due process.** [Emphasis added.] It is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference;... that destroys his entitlement without according him proper procedural safeguards." (See Parratt v Taylor, 451 US 527, 68 L Ed 2d 420, 101 S Ct 1908).

The petitioner seeks this court's review under the provisions of the federal APA, 5 USCS § 10e(1) as the inaction of the agencies has significantly prejudiced the entire case. The general principles governing the appropriate scope and standard of judicial review of

federal administrative agencies actions is codified in the Administrative Procedures Act, (APA) 5 USCS §§ 701; 706. Also, the Utah Administrative Procedures Act, (UAPA) § 63-46b-16(4)(a-h) provides for a judicial review of the administrative agency's actions, where there has been a trend in case law to require factual findings of an agency to be based on substantial evidence. (See e.g., Bennett v. Industrial Commission, 726 P.2d 427, 429 (Utah 1986); Big K Corp., 689 P. 2d at 1353).

The law states, (5 USCS § 704) "It is a fundamental rule of judicial administration that a party must exhaust his administrative remedies prior to obtaining judicial review of agency action,...that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." (See 42 U.S.C. §12117(a); Osborn v.E.J. Brach, Inc., 864 F.Supp. 56 (N.D.Ill.1994). Therefore, when the petitioner was forced to wait for the agencies to investigate, he was also forced to turn over any control to adjudicate, and Utah Labor attorneys refused to help, as the agencies should have resolved that issue much earlier.

STATE COURT ACTION

The petitioner filed an action February 12, 1996, in the Weber County 2nd District Court in the State of Utah, (case # 960900063PI) to prevent default of the statute of limitations, in this ADA labor claim. The court clerk declined to submit the case for trial without a mandatory Right To Sue letter from the EEOC. The

petitioner made formal written request April 18, 1996, which was ignored, along with 37 calls to the EEOC, over 22 months, prior to receiving the requested letter.

On July 29, 1997 the state court dismissed without prejudice all the federal claims, after waiting sixteen months for a right to sue letter. The state court ordered the negligence charge to proceed on August 21, 1997. The defendants took the same profile they had with the administrative agencies, ignoring written requests and phone calls. They refused to cooperate for 60% of the discovery period until the petitioner motioned the court for an order compelling discovery. To this day, the Welfare Services Personnel Director has refused to release his records to the court or to the agencies. See 29 C.F.R. § 1602.14 which states an "employer shall preserve all personnel records relevant to the charge until the final disposition of the charge or action".

THE PRESUMPTION ISSUE

The petitioner **established a prima facie case** in the state court, with three doctor's evaluations, therapist report, and medical examinations, MRI's, xrays, surgery reports, and other documents during discovery (29 CFR §§1630.2(g)(i); 1630.2(j)(3)(i)). (See Bullion v. JMBL, Inc., 657 So. 2d 834 (Ala.1995)). The EEOC also verified a prima facie case with the documentation, to which the defendants were silent, (See Texas Dept. Of Community Affairs v. Burdine, 450 US 248, 67 L Ed 2d 207, 101 S Ct.1089 (1981.) In a more recent case, (Price Waterhouse v. Hopkins, 490 US 228, 104 L Ed 2d 268,

109 S Ct. 1775 (1989.) six members of the court agreed that after the establishment of a prima facie case by the plaintiff that the only way a defendant employer may avoid a finding of liability was by proving, by a preponderance of the evidence, that they would have taken the same actions. Justice O'Connor concurred and then extensively elaborated on the fact that particularly was this the case in cases where there has been a tort for the breach of a duty of care in a Title VII case, as in the instant case. Rule 14 of the Utah Rules Of Evidence states: "... once the basic fact supporting the presumption is established, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates...." (See Koesling v. Basamakis, 539 P.2d 1043, (Utah 1975)); Also Jones v. Corrections Corp. of America., 993 F. Supp. 1384 (D. Kan.1998). If evidence to rebut a presumption has not been admitted, the presumption will determine the outcome of the issue. Federal courts are required to give the same effect to state-created presumptions that a state court would under 42 U.S.C. § 416(h), (See Spradlin v. United States, 262 F. Supp. 502.); Also see Bullion v. JMBL, Inc. 657 So. 2d 834 (Ala. 1995) The initial burden of establishing a prima facie ADA case rests on the disabled employee. Once established, the prima facie case serves as a rebuttable presumption that the employer unlawfully discriminated against the employee and the employer is required to present a legitimate, nondiscriminatory reason for its actions.

If we go along with the intent of the United States Congress, rather than the presumption mandate,

then the Fourteenth Amendment requires "an opportunity... granted at a meaningful time and in a meaningful manner...for [a] hearing appropriate to the nature of the case," (Boddie v. Connecticut, 401 US 371, 378, 28 L Ed 2d 113, 91 S Ct 780).

SUMMARY JUDGMENT OF NEGLIGENCE

The memorandum supporting the motion for summary judgment must begin with a concise statement of material facts "**and shall specifically refer to those portions of the record upon which the movant relies.**" Local Rule 4-501 (2)(a) (emphasis added.)

Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to the party's case, and for which that party will bear the burden of proof at trial. Corporation v. Catrett, 477 U.S. 317 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of genuine issue of material fact. See Rule 56(e), Utah Rules of Civil Procedure(URCP). If there is any genuine issue as to any material fact, see Hicks v. City Watonga, 942 F.2d 737, 743 (10th Cir. 1991) the motion should be denied, and summary judgment is improper. See Rule 56(c) URCP. An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Ehlers & Ehlers Architects v. Carbon County, 805 P.2d 789 (Utah Ct. App. 1991). Once that burden has been met, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. See Drysdale v. Ford motor Co., 947 P.2d 678,

680 (Utah 1997); also Gonzales v. Millers Casualty Ins., 923 F.2d 1417 (10th Cir. 1991). Finally, **none of the material facts asserted by the moving party are deemed admitted if they are specifically controverted by the opposing party,** Local Rule 4-501 (2)(b).

The Petitioner, Mr. Buck, set forth in the pleadings and admissions on file (Memorandum in Support of a Cause of Action, August 12, 1997), along with doctors evaluations, xrays and MRI records, and the physical therapist's report, at the State 2nd District Court that extensively outlined sufficient facts to meet the above requirement, to which the defendants failed to meet their Rule 56(e) responsibility. The judge also had these material facts before him, but failed to take them into account, (See letter from the court clerk, App. 22.) prior to summary judgment decision, February 11, 1998.

On review of summary judgment or a motion on the pleadings treated as a motion for summary judgment under Rule 12(c), U.R. Civ. Proc., the party against whom the judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising there from, considered in the light most favorable to him. (Mountain States Tel. & Tel. Co. v. Garfield County, 811 P.2d 184 (Utah 1991)); (Winegar v. Froerer Corp.,813 P.2d 104 (Utah 1991)).

The Utah Supreme Court has further held that since summary judgment denies the losing party the Article 1, Section 11, Utah Constitutional privilege of a trial, any "doubt or uncertainty as to the questions of negligence... should be resolved in favor of granting... a

trial." Butler v. Sports Haven Int'l, 563 P.2d 1245 1246 (Utah 1977). . The Tenth Circuit observed, "[w]hen different ultimate inferences may be drawn, the case is not one for summary judgment." (See Wright v. Southwest Bell Tel. Co., 925 F.2d 1288, 1292 (10th Cir. 1991).

Brief examples of the negligence of this case, that the UADD should have investigated. On March 30, 1995 three days after the doctor released the petitioner ack for part time work, Mr. Buck's managers took the therapist's report, prepared for the doctor's use, called Mr. Buck into the manager's office, and interrogated him as to what they thought were inconsistencies from the release to work note from his physician. They challenged the doctor's report and wanted Mr. Buck to go to their own industrial work-med doctor. Mr. Buck saw Dr. James Jacks, of Work-Med on the following day, March 31, 1995, who confirmed both the hospital MRI report, and Dr. James Heiden's evaluation, and gave several precautions to prevent further injury, one of which was not to lift over 30 pounds.

The defendants insisted that Mr. Buck unload glass carts, which required bending, and twisting, which both doctors and the therapist discouraged. The defendants also required the rest of his time be spent standing at a register. Mr. Buck mentioned to his manager that the register work was killing his back, even with the Percocet that he was taking, the manager's only response was that the therapist said standing should be okay, so that was where the defendants wanted him for the next four weeks. Kilroy v. Husson College, 959 F.

Supp.22 (D.Me 1997). The defendants did this without even consulting the doctor's recommendations.

The Utah Court of Appeals speaking regarding this kind of negligence has stated, Summary judgment is inappropriate unless the applicable standard of care is "fixed by law" "and reasonable minds could have reached but one conclusion as to the defendant's negligence under the circumstances." See Wycalis v. Guardian Title of Utah,780 P.2d 821, (Utah 1989) (citing Ingram v. Salt Lake City,733P.2d 126, (Utah 1987)).

When Mr. Buck came out from behind the register to walk because of pain in his back, in spite of medication, and that he had placed a stool by the register to sit on, it seemed to infuriate the manager who said to Mr. Buck "what is there about that memo you don't understand?" (Revised Work Schedule Memo, which included a new lifting requirement of 50 lbs., to start on April 21, 1995, two weeks later).

The defendants had required 50 lbs. lifting in Mr. Buck's previous assignment, which had resulted in a herniated disc, and personnel had given no guidelines to the manager from the doctors when they had them on file. Quint vs. A.E. Staley Mfg. Co., 72 F.3d 1.(1st Cir. 1999). The supreme Court has held that "[o]rdinarily, whether a defendant has breached a required standard of care is a question of fact for the jury. Jackson v. Dabney, 645 P.2d 613, 615, (Utah 1982).

It was then that Mr. Buck contacted the UADD for help, and when the defendants learned about the contact, that was when Mr. Buck alleges the defendants terminated him, in violation of their own personnel policies. See Flynn v. Raytheon Co., 868 F. Supp. 383(D. Mass.1994). An employer cannot be selective in the enforcement of its own policies. This violation of wrongful termination, is also against Utah "public policy." See Caldwell v. Ford, Bacon & Davis Utah Inc., 777 P.2d 483, 485 (Utah 1989); Berube v. Fashion Center Limited, 771 P .2d 1044; also Peterson v. Browning,832 P .2d 1280, (Utah 1992), where the court states, "This Court cannot agree that the [state] should close its eyes, and as a matter of policy, not be concerned with violations of federal law." at p.1283.

The State 2nd District Court scheduled oral hearing on November 5, 1997, five days after discovery cut-off, to address three motions. The first motion was Mr. Buck's, to compel discovery; the second, also Mr. Buck's, to extend the time; and the third, was the defense counsel's, to dismiss. The court apparently allowed discovery to continue, but the **court clerk failed to docket the change order, or to notify the parties, prior to dismissal 75 days later.** See Gilbert v. Sowders, C.A. 6th , 1981, 646 F.2d 1146. On February 11, 1998, the state court **dismissed with prejudice the negligence charges by summary judgment** against Mr. Buck, the petitioner, who had been confused by the lack of communication from the court, and had not trusted the defense counsel and therefore had not responded to his request. Eight days later, on February 19, 1998, the

EEOC issued a Right To Sue letter. The Right To Sue letter arrived the same day negligence charges were appealed to the state appellate court. This was thirty three months after the charges were first taken to the UADD in April, 1995.

The Utah Government Records Access and Management Act, Title 63-2-202(1), Access to Private, Controlled, and Protected documents, states: " (1) Upon request, a government entity shall disclose a private record to: (a) the subject of the record." It also states under the section of private records, Title 63-2-302(i)(B) that records can be released if to withhold would prevent a fair and impartial hearing.

Even though this case was before the state court, general counsel for the UADD refused to release any of Mr. Buck's records prior to the case going to the **federal court.** It also states in federal regulation, Section 709(e) of Title VII, 42 USC § 2000e-8(e) which provides, in part, that it is illegal to release "... information obtained by the Commission pursuant to its authority under this section **prior to the institution of any proceeding under this title involving such information.**" This made the general counsel's actions of refusing to release the information when the case was in the state court, a **violation for a fair and impartial trial in the state court.**

The District Court has jurisdiction under the APA, 5 U.S.C. § 706(2)(A), to review the "whole record" to determine that agency's actions are not "arbitrary, unreasonable, capricious or unlawful";

therefore, the court should have required the agency to release the whole record for review. Citizens to Preserve Overton Park v.Volpe,401 U.S. 402, 415-416, 91 S. Ct. 814, (1971).

William Ryan, the EEOC Enforcement Officer, said that Mr. Buck had **federal rights in a federal district court**. (Reproduced at App. 31.) Mr. Ryan did not say to take the federal claims into a county court, but to the federal court.

Mr. Buck's family attorney had heart surgery about the same time as Mr. Buck's Second back surgery in 1995. He declined help and was closing his practice. Mr. Buck, unable to secure counsel, took both the EEOC Enforcement Officer, and the General Counsel for the UADD, at their word. The state has a whole staff of attorneys with fiduciary responsibilities that are supposed to assist constituents. Therefore, Mr. Buck took the federal claims into the federal court.

Mr. Buck, the petitioner, seeks review of what appears to be a Constitutional error by the State 2nd District Court. The clerk failed to update the court docket during the discovery period for 75 days. Also, the **court failed to provide a change order, when it had indicated earlier that a court order was mandatory in order to modify discovery,** (Reference report of the Utah State 2nd District Court letter, reproduced at App.21) which caused confusion and led to the dismissal. Gilbert v. Sowders, C.A. 6th , 1981, 646 F.2d 1146.

Federal agencies are required to preserve " the opportunity and authority of the state and local government to work out their own problems if they are willing to do so" 110 Cong. Rec. 12688 (1964). The House Bill further directed the EEOC to recind any agreement with a state agency if the EEOC determined that the agency was no longer effectively exercising its power to combat discrimination. See HR 7152, 88th Cong., 2nd Sess. § 708, 110 Cong. Rec. 2511-2512 (1964). Federal courts apply the full faith and credit statute, but state courts are bound by the supremacy clause to enforce and to obey federal law. In Department of Revenue of Oregon v. ACF Industries, 501 U.S. 332, 114 S.Ct. 843, 127 L.Ed.2d 165, (1994), the court held

> "When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope. We will interpret a statute to preempt the traditional state powers only if that result is 'The clear and manifest purpose of Congress.'"

Id. at 345, 114 S. Ct. at 850-51 (citations omitted).

However, it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. The Supreme Court has jurisdiction to make sure that federal statute is uniformly applied and has the same meaning and effect in all states of the Union. See St. Louis, I.M. & So. RY. v. Taylor, 1908, 28 S. Ct. 616, 620, 210 US 218, 293, 52 L Ed. 1061.

Petitioning the United States Supreme Court's discretionary powers for a Writ Of Certiorari is done because relief cannot be obtained in any other form or from any other court, in the instant case, the petitioner was denied an opportunity for relief. See Boddie v. Connecticut, 401 US 371, 378, 28 L Ed 2d 113, 91 S Ct 780,. The "substantial evidence" test has long been applied to judicial review of federal agency decisions. (See United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966). The same test has been applied in federal review of state administrative proceedings in testing the sufficiency of evidence to meet minimum requirements of due process. (See In re Ruffalo, 390 U.S. 544 (1968); Scogginn v. Lincoln Univ., 291 F. Supp. 161(W.D. Mo. 1968)).

However, the Supreme Court has ruled numerous times on the impossibility of a litigant, by the mere availability of a subsequent tort remedy, to obtain the due process of which the Fourteenth amendment speaks. (See Sniadach Family Finance Corp. 359 U S 337, 23 L Ed 2d 349, 89 S Ct 1820 (1969); Fuentes v Shevin, 407 US 67, 32 L Ed 2d 556, 92 S Ct 1983 (1972)).

THE FEDERAL COURT ACTION & RES JUDICATA ISSUE

The long-established doctrine of res judicata, according to the original Restatement of Judgments, is based on the "public policy of putting an end to litigation". Since the framing of the Constitution state courts have been considered rightly or wrongly to be the appropriate enforcers of federal law. However, because

of local prejudice or inexperience with federal law, state courts may often provide a dubious forum for adjudication of federal rights. See Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977). Much of the criticism was directed at the lawlessness of southern juries after the legislation enacted in the 1871 Act, where there was no mention of res judicata, but some of the criticism has been directed at the entire judicial system. See Mitchum v. Foster, 407 U.S. 225, 240-41 (1972).

Congress envisioned federal intervention only when "States declined, for whatever reason, to take advantage of [their] opportunities" to settle grievances in "a voluntary and localized manner." Cong. Rec. 12725(1964), Oscar Mayer & Co. v. Evans, 441 US, at 761, 60 L Ed 2d 609, 99 S Ct.2066. On certain occasion the circumstances may be so substantial as to justify departure from the traditional rule of federal-state non interference. Interference with legitimate activities of the state ought not to be tolerated so long as state courts provide an adequate opportunity to resolve claims.

The Congress in section 1738 of Title 28, the full faith and credit statute does not mandate a uniform federal law of res judicata, but it does require that a claim or issue be precluded in federal court if the res judicata law of the state in which the judgment was rendered so indicates. In both instances, when dealing with the federal issues of this case, the administrative agencies and the state court relinquished their jurisdiction and pointed the case to the federal court.

To be sure, state courts are bound by the terms of the supremacy clause to enforce and obey federal law. In 1994 when Congress amended both the Rehabilitation Act [42 U.S.C. § 12202 (1994)], and the ADA [42 U.S.C. § 2000d-7 (1994)], they mandated statute that prohibits states from violations of discrimination. However, any federal policing of the state courts must come on direct review by the Supreme Court.

In the state trial court inquiry Mr. Buck had indicated that the case had only gone to the court because of the fact that the UADD had done nothing. Mr. Buck, who had serious medical problems, went to the court to preserve his rights under the statute, he also asked that the EEOC be allowed to complete their work prior to a court case when he realized the EEOC was the entity that needed to supply the mandatory Right-To-Sue letter as outlined by law (42 U.S.C.§ 12111(a)). In the instant case the plaintiff was bound by the administrative agency's power of arbitration. (See McWilliams v. Logicon, Inc., 10th Cir.1998).

The Res Judicata issue would be a moot issue if indeed there was sufficient evidence that the petitioner had actually received a full and fair trail. (See [42 U.S.C. §§ 12112(a) ; 12132.]; Also McNely v. Ocala Star-Banner Corp. 11th Cir. 1996). There is substantial evidence to demonstrate that Mr. Buck was denied a full and fair trial in this case.

The State 2nd District Court dismissed charges on February 11, 1998, and the EEOC supplied the mandatory Right To Sue letter on February 19, 1998.

This gave Mr. Buck 20 days to prepare and submit the federal claims that had been dismissed earlier without prejudice, back to the state court rather than the 90 days as outlined by federal regulation in Title VII of the ADA. **When Mr. Buck requested access to his file at the UADD, the commission's general counsel declined, using Utah Code 34A-5-107(14)(a-d), and said that until the case was filed in federal court they would not comply to the requests.**. They would not comply even after the federal claims were filed in federal court. When Mr. Buck requested access to his file, if possible, within 20 days, the UADD general counsel sent the defendants a letter saying he would deny Mr. Buck access for an additional 15 days. Medical offices and administrative agencies are allowed by law 30 days to respond to any record request. That is the reason Congress allowed the 90 days to file Title VII claims in the court. Thus 20 days is unreasonable.

As Justice Blackmun indicated, when a state official neglects his official duty, **"The availability of a post-termination tort action does not provide appellant due process..."** The state's negligent actions in the instant case deprives Mr. Buck of equal protection and in the words of Justice Blackmun is not **"rationally related to the legitimate governmental objectives"** [Emphasis added] and becomes offensive to public policy, because a state official has neglected his official fiduciary obligation.

Res judicata is subject to exception when its application would be opposed to public policy. As has been stated by courts and legal writers, the doctrine of

res judicata-the term being used in a broad sense to indicate the effect of a judgment as precluding further litigation-is based upon the public policy of putting an end to litigation. "The term 'res judicata' is not a fetish before which all defenses must bow down. ...it is a doctrine of peace. Nor is it to be applied to the denial of justice, to deprive one of a just defense, to close the courts to all inquiry into the truth. A reading of the well-considered cases fails to show one in which its application has been to do injustice." See E.E. Souther Iron Co. v. Woodruff Realty Co. (1913) 175 Mo. App 246, 158 SW 69.

COMPELLING REASONS FOR GRANTING CERTIORARI

Review in this Court on a Writ of Certiorari is granted "only for compelling reasons" (Rule 10 of the Supreme Court of the United States, 28 U.S.C.A.). Discretionary jurisdiction by Writ of Certiorari serves to reserve the resources of the United State's highest court for the most significant legal and public policy matters, particularly in unsettled or developing areas of the law.

Determining whether the United States Court of Appeals for the Tenth Circuit, and the adjudicative bodies below, erred in the disposition of this ADA case constitutes special and important or "compelling" reason as to merit the nations highest court's review. In this case the decisions of the Utah Courts are in direct conflict with other decisions made by Federal Appellate Courts of the United States, as well as other State Supreme Court decisions.

ADA case law is still in the formative stages nation wide and that is especially true in the state of Utah where there appears to have been a limited number of cases that have come before the Utah Supreme Court. There appears to be some confusion in this new and formative area of the federal law within the state, which would warrant the intervention of the nation's Highest Court. This confusion or lack of clarity in the administration and adjudication of the law is not just exclusive to the court system, but originated with the administrative agencies. Puerto Rico Sun Oil Co., v. EPA, 8 F.3d 73, 77 (1st Cir.1993) Even the state lawyers are very reluctant to involve themselves, which left this pro se litigant with no place to turn for help.

WHEREAS, this is not an isolated incident by the defendants in this case; this would suggest that they are not only misunderstanding the application of the law, but also the importance and meaning of it; and

WHEREAS, the defendants have offered no explanation for their discharge of Mr. Buck, the petitioner, if their reasons were not retaliatory, then why would they terminate right in the middle of a medical crisis?, which was against their own personnel policy, Holland v. A.T. Kearney, Inc.,1999 WL 172327 (N.D. Tex.1999.); and

WHEREAS, the defendants are the ones primarily responsible for the level of disability in this petitioner;

WHEREAS, the defendants have repeatedly refused cooperation with the administrative agencies in

releasing relevant records to this charge, 29 C.F.R. § 1602.14; and

THEREFORE, they bear the primary accountability.

WHEREAS, this Court has concurred in their prior decisions that "such a failure in the administrative agencies creates two classes of claimants, those who receive the protection of the law, and those who do not, which violates the Fourteenth Amendment right of the petitioner to the equal protection of the laws; and

THEREFORE, the clear and manifest purpose of the Congress under the ADA is that employers are required to understand and voluntarily comply to the law.

WHEREAS, Title I of the ADA make it mandatory that a claimant has the prerequisite of filing a timely charge with the administrative agencies before initiating suit in the court, 42 U.S.C. Sec. 12117(a); and

WHEREAS, the claimant loses his rights to his claim for failure to make such filing. When a defendant remains silent thirty three months to the inquires of the EEOC, after a prima facie case has been established; and

THEREFORE, the enforcement of a mandatory statute of presumption seems logical, reasonable, and fair.

WHEREAS, it appears that the Utah Court of Appeals failed to duly note the failure of the administrative agencies involved, and the federal district court opted to

adopt the state decision under the full faith and credit, rather than acting under the supremacy clause; and

WHEREAS, the EEOC who had primary jurisdiction for adjudication and issuance of a "Right To Sue" letter has indicated that the statute of res judicata was improperly applied, and needed to be appealed; 5 U.S.C.A. § 706(2)(A); and

WHEREAS, the Congress addressed the likelihood that many Title VII litigants, because unique circumstances may face the necessity of lay, or self representation; and

THEREFORE, the application of res judicata in this case would be unjust and unreasonable, and should be reviewed; and

WHEREAS, the case law is established and precedent can be applied to the established rules of statutory construction to make a proper decision and the law of credibility suggests that significant errors in the summary judgment of negligence charges are out of harmony with both the Utah Higher Court, and other Federal Appellate Court decisions of case law; and

THEREFORE, the instant case would be "compelling" and worthy of review.

WHEREAS, the State 2nd District Court chose, after waiting sixteen months for a right to sue letter, to dismiss all federal claims without prejudice; and

WHEREAS, this petitioner has been denied even a hearing, on all his federally protected claims, not because of any fault of his own, but because of the neglect of governmental officials, who failed to act, even though they are required by law to do so; and

WHEREAS, this would deny the petitioner of his due process rights, even though Congress has provided for litigation against violating states and federal agencies;

THEREFORE, judicial review by this Court would be imperative in the instant case.

WHEREAS, there was significant confusion in the Utah administrative agency concerning the meaning of the statutory provisions of the ADA; and

WHEREAS, one doctor's report, verifying disability, does not "constitute the whole record" by the UADD, and a "right to sue" letter, alone, does not meet the requirement of a "substantial weight review" by the EEOC, which would constitute the basis for review by statutory law under the APA, 5 U.S.C.A. § 706(2)(A);

WHEREAS, there is one state adjudicative body evaluating another, which lends itself to the possibility of bias in the judicial process;

THEREFORE, all these are special and important or "compelling" reasons THAT significantly affect the public policies of a state and nation.

WHEREAS, this petitioner, because of the violations and resulting medical challenges and age, will never again be able to compete in the market place and secure employment sufficiently gainful to support his family of six children; and

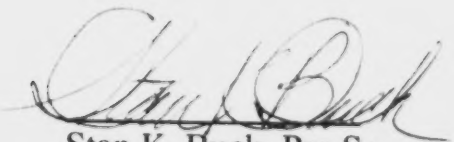
THEREFORE, last of all, to grant certiorari would be the only right, fair, and proper form of justice in this situation.

THEREFORE, the petitioner prays THAT the court grant this special Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the petitioner, Stan K. Buck respectfully prays for a Writ of Certiorari to review the November 8, 1999 judgment and opinion of the United States Court of Appeals for the Tenth Circuit, and all subsequent actions by adjudicative bodies below, entered in this case .

Respectfully,



Stan K. Buck, Pro Se

Date: April 10, 2000.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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3. Unreported Opinion and Order of the United States Federal District Court Central Division ORDER granting Defendant's Motion to Dismiss on res judicata July 16, 1998 (App. 4.)

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8. Unreported Opinion and Order of the 2nd Judicial District Court of Weber County for the State of Utah, July 29, 1997 (App. 17.)

9. Opinion and Order of the 2nd Judicial District Court of Weber County for the State of Utah, February 12, 1998 (App. 20.)

10. Report and Recommendation of the 2nd Judicial District Court of Weber County for the State of Utah, April 14, 1998 (App. 22.)

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12. Report and Recommendation of UADD, December 9, 1997 (App. 26.)

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16. Report and Recommendation of the EEOC, February 19, 1998 (App. 31.)

17. Report and Recommendation of the EEOC, September 1, 1998 (App. 35.)

App. 1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 99-4152

Stan K. Buck

v.

Ogden Deseret Industries, Welfare Services

DATE:Filed November 8, 1999

Before BALDOCK, BRORBY, and HENRY, Circuit Judges.

Plaintiff Stan K. Buck's notice of appeal states that he appeals the district court's July 23, 1998 Judgment, which was entered July 27, 1998, in favor of Defendants. *See* Fed.R. App.P.3(c); *Smith v. Barry*, 502 U.S.244,248 (1992).

This appeal is jurisdictionally defective. The thirty-day deadline under Fed.R.App.P.4(a)(1) for the filing of a timely notice of appeal expired on August 26, 1998. Plaintiff filed his notice of appeal in the district court on July 22, 1999, which was approximately eleven months past the thirty-day deadline. Contrary to Plaintiff's assertions in his memorandum brief, no timely motion pursuant to Fed.R.App.P.4(a)(4) was filed in the district court that suspended the time for filing a notice of appeal. A pro se appellant must comply with the requirements of the Federal Rules of Appellate Procedures that govern all litigants. Ogden v. San Juan County, 32F.3d452,455(10th Cir. 1994) cert.denied, 513 U.S. 1090(1995).

Compliance with filing requirements is mandatory and jurisdictional. Budinich v Becton Dickinson & Co., 486 U.S.196,203(1998). Plaintiff's notice f appeal is untimely. The court lacks appellate jurisdiction.

The appeal is DISMISSED. The mandate will issue forthwith.

Entered for the Court,
Patrick Fisher, Clerk

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 99-4152

DATE:Filed November 24, 1999

Before BALDOCK, BRORBY, and HENRY, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court
by: "s/L. Bakzano"
Deputy Clerk

United States Federal District Court for the
District of Utah, Central Division

Case No. 1:98 CV 00058 K

ORDER granting Defendant's Motion to Dismiss

DATE:16 July, 1998

Stan K. Buck, Plaintiff v. Ogden Deseret
Industries/L.D.S. Welfare Services, Defendant

This matter is before the court on the Motion to Dismiss for Stan K. Buck's ("Plaintiff") failure to state a claim upon which relief can be granted of Defendant Ogden Deseret Industries/L.D.S. Welfare Services ("Defendant").

I. BACKGROUND. Plaintiff was employed by Defendant L.D.S. Welfare Services from January, 1984, to April, 1995. Initially Plaintiff worked at a mill, but later worked at various other jobs within the Welfare Services organization, including Deseret Industries. Plaintiff alleges that he is permanently disabled as a result of three separate occasions of misconduct on the part of Defendant, which occurred in August 1984, May 1992, and December 1994. In December, 1994, Plaintiff, while working at the Ogden Deseret Industries, herniated a disc in his lower back due to an on-the-job injury. After eight weeks of therapy, Plaintiff returned to work. Plaintiff alleges Defendant continued to require him to lift heavy objects in contravention of his physicians'

directions, causing permanent disability.

Plaintiff alleges that he was the victim of discrimination as a result of his complaints to the Utah Industrial Commission and that he was wrongfully terminated in a retaliatory action, in violation of the Defendant's own Personnel Policy, without being granted an exit interview. Plaintiff is representing himself pro se.

In February of 1996 Plaintiff (pro se) filed an action in state court based upon the same factual allegations and against the same Defendant as in the present case. The prior state court action is referred to as *Buck II*. The court concluded in its findings of fact that Plaintiff alleged generally that (1) he was wrongfully terminated from his employment, (2) Defendant fraudulently failed to report an industrial accident, (3) Defendant was guilty of negligent misconduct resulting in A) physical injury, B) character incrimination, and C) loss of reputation, and (4) Defendant was guilty of consortium. Plaintiff also alleged a discrimination claim that was dismissed without prejudice.

After more than a year of inactivity, on June 26, 1997, Defendant filed a motion to dismiss *Buck I* for failure to prosecute. The court ruled on August 6, 1997, that the discrimination claim was dismissed without prejudice, but the remaining claims were not dismissed inasmuch as Plaintiff was under the mistaken belief that he could not proceed without final action by the Equal Employment Opportunity Commission ("EEOC").

The discovery cut off date for *Buck I* was set for

November 1, 1997. During September and October of 1997, Defendant attempted to depose Plaintiff. Plaintiff failed to cooperate and refused to allow the completion of the deposition prior to the discovery cut off date. On October 27, 1997, Defendant filed a motion to dismiss for Plaintiff's failure to allow completion of discovery. The court allowed document production already commenced to continue. Plaintiff failed to produce the requested documents without explaining his failure to do so. On December 1, 1997, Defendant filed a motion to dismiss or limit evidence for failing to allow completion of deposition and inspection of documents.

On March 12, 1998, the court dismissed with prejudice *Buck I*, finding that Plaintiff had violated Rule 37(d)(1) of the Utah Rules of Civil Procedure and that he also failed to comply with Rule 34. The court concluded that any partial remedy authorized by Rule 37 would effectively lead to dismissal in any event. The court of appeals affirmed the trial court's order of default judgment in favor of Defendant.

During *Buck I*, Plaintiff was issued a Right to Sue letter by the EEOC on April 29, 1997, which authorized Plaintiff to proceed with his federal discrimination claim. Plaintiff subsequently asked the EEOC to reconsider investigating his allegations. The EEOC granted his request, rescinding the Right to Sue letter in order to do so. The EEOC was unable to conclude that the allegations established violations of the statutes and reissued a Right to Sue letter on February 19, 1998.

II. DISCUSSION. The issue presented by this

Motion to Dismiss is whether Plaintiff's claim is barred as a matter of law by res judicata when a previous state court action based on the same facts and circumstances was dismissed with prejudice and on the merits due to Plaintiff's failure to cooperate fully in the discovery process. The Court concludes that Plaintiff's claim is barred as a matter of law according to the doctrine of res judicata.

The Tenth Circuit Court of Appeals has stated that "we must give a state court judgment" "the same preclusive effect as would be given that judgement under the law of the State in which the judgment was rendered." Klein v. Zavaras, 80 F.3d 432, 434 (10th Cir. 1996)(quoting Migra v. Warren City School Dist.Bd. of Educ., 104 S. Ct. 892, 896 (1984). Accordingly this Court is required to determine the preclusive effect that *Buck I* would have in state court and give it the same measure of preclusion.

The doctrine of res judicata encompasses two separate elements, claim preclusion and issue preclusion. See Noble v. Noble, 761 P.2d 1369, 1374 n. 5 (Utah 1988). In this case we consider the claim preclusion element of res judicata pursuant to Utah law. The Utah Supreme Court has stated that, "[c]laim preclusion bars a case of action only if the suit in which that cause of action is being asserted and the prior suit satisfy three requirements. First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in

a final judgment on the merits." Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988). The first requirement is clearly met, the parties are identical in *Buck I* and *Buck II*. However, the second and third element require further elaboration.

Plaintiff contends that neither the discrimination nor the retaliation claims alleged in *Buck II* could have been brought in *Buck I* because the EEOC had not yet issued a Right to Sue letter. Plaintiff further contends that the absence of a Right to Sue letter was the result of the Utah Industrial Commission's failure to file a complaint with the EEOC. While Plaintiff is correct in asserting that he could not bring the discrimination action without a Right to Sue letter, Plaintiff erroneously concludes that it was not his fault. The EEOC will issue a Right to Sue letter at any time upon a proper request. See 29 C.F.R. § 1601.28 (1997). As Plaintiff admits, a Right to Sue letter was issued on April 29, 1997, in which Plaintiff was informed that his claim was filed too late with the EEOC but that Plaintiff was free to proceed with the civil litigation. At Plaintiff's request the EEOC reopened his case to reconsider the timeliness of his claim and rescinded the previous Right to Sue letter. The EEOC determined that Plaintiff's claim was timely but that they would not pursue it any further and once again issued a Right to Sue letter on February 19, 1998, eight days after the state court decided to dismiss *Buck I*, but almost a month before the order was signed. It is clear that Plaintiff did have the opportunity to re-file his discrimination claim in *Buck I* if he so chose. According to Utah law, Plaintiff's discrimination and retaliation claims are claims "that could and should have been

raised in the first action." Madsen, 769 P.2d at 247. The court concludes that the second element required for res judicata to apply is met.

Finally the Court addresses whether *Buck I* "resulted in a final judgment on the merits." Id. The Utah District court clearly stated in its order of dismissal that *Buck I* was "dismissed with prejudice and upon the merits." Furthermore Rule 41(b) of Utah Rules of Civil Procedure states the "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction on for improper venue or for lack of an indispensable party, operates as an adjudication on the merits." Utah R.Civ.P.41(b)(1998). Because *Buck I* was not dismissed for lack of jurisdiction or for improper venue, it "operates as an adjudication on the merits," id., and therefore, the third element required under Utah law for res judicata is met. See Madsen, 769 P.2d at 248.

Regardless of the validity of Plaintiff's allegations, this Court is bound by federal and state law to dismiss *Buck II* because it is barred as a matter of law by the doctrine of res judicata.

III. CONCLUSION. For the foregoing reasons, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is GRANTED. Each party to bear its own costs.

Dated this 16th day of July, 1998.
BY THE COURT:
"/sDale A. Kimball," United States District Judge.

App. 10

United States District Court, Northern Division for the District of Utah

Case Number: 1:98cv58K

JUDGMENT IN A CIVIL CASE: plaintiff's cause of action is dismissed as barred by res judicata

DATE:23 July, 1998

Stan K. Buck
v.
Ogden Deseret Industries/LDS Welfare Services.

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff's cause of action is dismissed as barred by the doctrine of *res judicata*.

July 23, 1998.

Markus B. Zimmer, Clerk
"s/Deputy Clerk"

entered on docket 7/27/98 by Depty Clerk

App. 11

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

RE: Case No. 1:98 CV 98 K

ORDER: Petition denied

DATE:17 February, 1999

Stan K. Buck, Plaintiff,

v.

Ogden Deseret Industries, Defendant.

Before the Court is Plaintiff's Petition for Stay and Tolling of Statute of Limitation in Appeal Process. Plaintiff's petition is denied on the ground that the law does not provide for the granting of such of relief to Plaintiff for the reasons he asserts.

DATED this 17th day of February, 1999.

BY THE COURT: "s/Dale A. Kimball," United States District Judge.

App. 12

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION.

Case No. 2[strike 2] 1:98 CV 058 K

ORDER: Motion denied

DATE:19 February [strike February] April, 1999.

Stan K. Buck, Plaintiff

v.

Ogden Deseret Industries, et al., Defendants.

Before the Court is Plaintiff's Motion for Re-evaluation of the Court's Decision Based on Additional Evidence, which this Court interprets as amotion for relief from judgment pursuant to Rule 60(b)(2) of the *Federal Rules of Civil Procedure.*

Rule 60(b) authorizes a court to relieve a party from a final judgment, order, or proceeding for a variety of reasons enumerated in 60(b)(1) through 60(b)(5), as well as, under 60(b)(6), for "any other reason justifying relief from the operation of the judgment." "Relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances." *Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991), cert. denied, 506 U.S. 828 (1992).* Such exceptional circumstances are shown by demonstrating the existence of one or more of the enumerated grounds for relief. Id. at 1243-44. The second enumerated ground, 60(b)(2), is "newly

discovered evidence which by due diligence could not he been discovered in time to move for a new trial under Rule 59(b)."

Reviewing Plaintiff's memoranda with the above-cited standards in mind, this Court concludes Plaintiff has not presented new evidence or demonstrated the existence of the kind of exceptional circumstances that would warrant relief. The evidentiary contentions described by Plaintiff concern Plaintiff's interactions with the Utah Anti-Discrimination Division and the Equal Employment Opportunity Commission beginning in 1995. Many of these contentions were before the Court in July 1998 when the Court granted Defendants' motion to dismiss. To the extent Plaintiff sets forth new contentions, he has not explained or demonstrated why he was not able to present them at the time the motion to dismiss was under consideration--Plaintiff knew at that time, for example, that the EEOC had not satisfactorily responded to his requests for documents.

To the extent Plaintiff now raises new legal arguments, Plaintiff has not explained why he should be excused from his failure to do so earlier.

THEREFORE, Plaintiff's motion is denied.

DATED this 19th day of February [strike February] April, 1999.
BY THE COURT: "s/Dale A Kimball," United States District Judge.

IN THE UTAH COURT OF APPEALS

Judges Bench, Billings, and Greenwood

Case No. 980199-CA

Memorandum Decision

DATE:11 June, 1998

Second District, Ogden Department
The Honorable W. Brent West

Before Judges Bench, Billings, and Greenwood.
PER CURIAM:

Trial courts are given broad discretion in the imposition of discovery sanctions and will not be reversed absent a showing of an abuse of discretion. Utah Department of Transportation v. Osguthorpe, 892 P.2d 4, 6 (Utah 1995). Because Buck has failed to show that the trial court abused its discretion, we affirm the trial court.

The sanction of default judgment is justified where there has been a frustration of the judicial process, viz., where the failure to respond to discovery impedes trial on the merits and makes it impossible to ascertain whether the allegations of the answer have any factual merit.

A defendant may not ignore with impunity the requirements of Rules 33 and 34...A party to an action

has a right to have the benefits of discovery procedure promptly, not only in order that he may have ample time to prepare his case, but also in order to bring to light facts which may entitle him to summary judgment or induce settlement prior to trial. The rules were designed to secure 'the just, speedy and inexpensive determination of every action. W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734, 738 (Utah 1977). In this matter, the trial court did not abuse its discretion.

The sanction of default judgment was justified due to Buck's persistent dilatory tactics which frustrated the judicial process, including Deseret Industries's ability to prepare its case.

Accordingly, the trial court is affirmed.
"s/Russell W. Bench," Judge
"s/Judith M. Billings," Judge
"s/Pamela T. Greenwood," Judge

App. 16

IN THE UTAH COURT OF APPEALS

FROM:Judith M. Billings, Judge

Case No. 980199-CA

Order Denying Petition for Rehearing

DATE:8 July, 1998

Before Judges Bench, Billings, and Greenwood.

This matter is before the court on appellant's petition for rehearing. Having reviewed and considered appellant's arguments, IT IS HEREBY ORDERED that the petition is denied. Appellant failed to present any "points of law or fact" which we "overlooked or misapprehended." See Utah R. App. P. 35(a).

Dated this 8th Day of July, 1998.

FOR THE COURT:

"s/Judith M. Billings," Judge

The Second Judicial District Court, State of Utah, Weber County, Ogden Department

Case No. 960900063PI

DECISION

DATE:29 July, 1997

Stan K. Buck,
Plaintiff,

v.

Ogden Deseret Industries, LDS Church Welfare Services,
Defendants.

The Defendant's Motion to Dismiss is denied, in part, and granted, in part.

The Plaintiff has the responsibility to actively pursue his claims. He must do so as expeditiously as is reasonable. In this instance, that had not been done. This case had lain dormant for approximately 16 months. The primary reason has been that the Plaintiff was under the mistaken impression that he had to have the E.E.O.C. complete and investigation, before he could proceed.

During the time that this case has been dormant, the Plaintiff has regularly informed the Court of the status of the E.E.O.C.'s investigation. Unfortunately, because he

is representing himself, the Plaintiff has not been notifying the Defendant.

Considering all the circumstances, the Court finds that the Plaintiff's actions constitute excusable neglect. As such, total dismissal, with prejudice, is too harsh of a remedy.

Plaintiff's first cause of action for fraud and his third cause of action for negligence are not dismissed. However, the case is ordered set for an immediate telephonic scheduling conference. There is no reason why those claims can't be prosecuted. They are not dependant upon any E.E.O.C. investigation.

Plaintiff's second cause of action for discrimination is dismissed, without prejudice. Defendant's statement of the law is correct. In cases alleging discrimination, a Plaintiff must first exhaust all of his administrative remedies. This includes filing a complaint with the E.E.O.C. As a precondition to filing a discrimination lawsuit, the Plaintiff must obtain a "Right-To-Sue" letter. A "Right-To-Sue" letter is usually obtained after an E.E.O.C. investigation is completed and there is a finding that there is a basis for the discrimination claim or a dismissal of the claim. A person can also obtrain a letter, if a claim is filed with E.E.O.C. and no action is taken by the Commission within 180 days. No "Right-To-Sue" letter has been obtained in this case. Since a letter has not been obtained, Plaintiff's cause of action alleging discrimination is dismissed.

No costs or attorney's fees are awarded. Each party is to bear their own.

Defense Counsel will please prepare a short order consistent with this ruling.

Dated this 29th day of July, 1997.

"s/W. Brent West," District Court Judge

IN THE SECOND JUDICIAL DISTRICT COURT OF
WEBER COUNTY, STATE OF UTAH, OGDEN
DEPARTMENT

W. Brent West, District Judge

Civil No. 960900063

Memorandum Decision

DATE:12 February, 1998

There are two Motions presently pending before the Court. The Court will address both motions individually.

Plaintiff's Motion for a Temporary Protective Order: Plaintiff's Motion for a Temporary Protective Order of Audio Tapes and Computer Disks is denied. It is denied for three reasons: First, the Plaintiff has not identified with any particularity which audio tapes and computer disks should be protected. Second, the Plaintiff has not given any reason why the audio tapes and computer disks should be protected. Finally, based upon the evidence produced during discovery, the tapes and disks appear to contain evidence which may be reasonably related to Plaintiff's cause of action and therefore should be discoverable by Defendant.

Defendants' Motion to Dismiss: Defendants' Motion to Dismiss the balance of the Plaintiff's complaint for Plaintiff's failure to complete his

deposition and for failing to allow the inspection of documents is granted with prejudice.

While the Court is usually reluctant to utilize such an extreme remedy, such remedy is appropriate in this case. First of all, Plaintiff has filed a very vague and general complaint against Defendant. Secondly, the discovery record is replete with instances where the Plaintiff has failed to cooperate in discovery. In addition, Plaintiff has been previously admonished by the Court to comply with and complete the discovery process. Fourth, a review of the record leads the court to conclude that Plaintiff's efforts have been in an effort to avoid disclosure of the underlying facts, evidence, witnesses, etc., that might support his cause of action against the Defendant. Fifth, Plaintiff's actions have made it next to impossible for the Defendant or the Court to determine exactly what evidence, if any, supports Plaintiff's claim. Finally, use of any other remedies appears to the Court to be inadequate.

Defendants' counsel to prepare findings, conclusions, and an order consistent with this ruling.

Dated this 11th day of February, 1998.

"s/W. Brent West," District Judge

IN THE SECOND JUDICIAL DISTRICT COURT OF
WEBER COUNTY, STATE OF UTAH, OGDEN

Response to procedural questions addressing clerical error

DATE:14 April, 1998

Mr. Stan K. Buck,

1784 East 21st Street,
Ogden, UT 84401.

Dear Mr. Buck: I am responding to your letter dated April 1, 1998, in which you ask various procedural questions.

You indicate that the minute entry of a November 5, 1997 court hearing did not appear on our docket until January 20, 1998. Our records indicate that the judge signed this minute entry on January 7, 1998, though it is true that two months passed before the minute entry was completed. The woman who was assigned as Judge West's clerk at the time is no longer employed with us, so I am unable to articulate why the delay took place. It is our general policy that clerks complete and file their minute entries within five business days. Due to the large volume of cases we are currently experiencing, our clerks at times have difficulty preparing their minutes within five days, but two months should not have passed before the entry was completed.

A scheduling order from the first telephone conference was mailed to you, and you question why you did not receive a similar order from the conference held November 5, 1997. Generally, when a discovery cut-off date or other important dates are outlined by the judge, the clerk will send out a scheduling order to ensure all the parties adhere to such dates. Sometimes a scheduling order may not be warranted. Similarly, at an in-court hearing, one of the parties is generally asked to prepare an order. At the November 5th hearing, nothing of substance was determined which would warrant a court order, so the Judge did not require an order be prepared.

We are happy to provide you with a copy of the minute entry, or any other document in the court file, upon request. There is a $.25 per page fee.

You also question why the January 20, 1998 hearing was video taped, and ask if notice that proceedings will be taped is provided by the court. Because we are a court of record, we are required by law to either tape proceedings, or have them transcribed by a court reporter. The large majority of our hearings are video taped, and the court is not required to provide notice of this. You are welcome to get a copy of the video tape, there is a $15.00 per tape fee. Parties may request a copy of the tape immediately after hearing, though there may be a waiting period of two or three business days for processing.

I hope I have sufficiently provided an answer to your questions. Should you have further questions or concerns, please feel free to contact me at 395-1062. Sincerely,"s/Venna Woodring," Asst. Clerk of Court.

State of Utah Labor Commission

Charges against the Industrial Commission

DATE:5 August, 1998.

Stan K. Buck,
1784 E. 21st Street, Ogden, UT, 84401.

Dear Mr. Buck: Your letter of August 3, 1998, suggests that your claim of unlawful employment discrimination has not been properly handled by the Utah Labor Commission and/or the federal Equal Employment Opportunity Commission ("EEOC"). However, I am advised that, pursuant to the Labor Commission's work share agreement with EEOC, your claim was referred to EEOC on about May 1, 1996 for investigation. As a result of its investigation, EEOC found no cause to believe your employer had engaged in unlawful employment discrimination. Consequently, on February 18, 1998, EEOC dismissed your claim, but issued a "right to sue" letter which authorized you to pursue your claim on your own in the civil courts.

In light of the foregoing, it appears to me that your claim has been processed and evaluated according to established practice. While I can understand that you disagree with EEOC's determination that no unlawful discrimination occurred, I do not believe applicable law permits the Labor Commission to take any further action.

Please feel free to call me at 530-6937 if you wish to discuss this matter further or if I can provide further information.

Sincerely,

"s/Alan Hennebold," Deputy commissioner/General Counsel, Utah Labor Commission.

cc: Jan Graham, Attorney General
Charles D. Burtner, District Director EEOC,
Joe Gallegos, Director UALD,
R. Lee Ellertson, Labor Commissioner.

State of Utah Labor Commission

UADD# W96-0053
EEOC# 35C-96-0471
Civil Court# 960900063PI

requested documents are confidential

DATE:9 December, 1997

Dear Mr. Buck,

With reference to your letter dated November 25, 1997, copy enclosed, I am sorry that the Utah Labor Commission cannot release the requested information. Pursuant to 34A-5-107(14), also enclosed, such information is confidential and can only be released for certain specified purposed. It does not appear that your request falls into any of the exceptions to the statute's confidentiality provisions.

If you require further information, please call me at 530-6937.

Very truly yours,

"s/Alan Hennebold," General Counsel, Utah Labor Commission.

enclosures

State of Utah Labor Commission

UALD No. W96-0053

Notice of request to view files to Rick Larson, Ogden D.I.

DATE:27 April, 1998

Mr. Rick Larson, Manager, Ogden Deseret Industries, 2048 Washington Blvd., Ogden, UT 84401

Re: Stan Buck v. Ogden Deseret Industries, UALD W96-0053.

Dear Mr. Larson: Please find enclosed a copy of a letter I received today from Mr. Stan Buck. As you can see, Mr. Buck seeks access to the Labor Commission's investigative file in the above referenced case.

Based upon the Labor Commission's experience in similar situations, we believe we are obligated to allow Mr. Buck to review the referenced file. The purpose of this letter is to give you notice of Mr. Buck's request so that you can take any action you believe is appropriate to protect your own interests. To that end, the Labor Commission will not allow Mr. Buck access to the file until after May 7, 1998.

Very truly yours,

"s/ Alan Hennebold," General Counsel, Utah

U.S. Equal Employment Opportunity Commission.
Phoenix District Office.

Certification No. P 132 374 736

EEOC Closing its file: filed untimely.

DATE: 29 April, 1997

Charge No. 35C-96-0471

EEOC Representative: Paul G. Manget, III, Supervisor. Telephone No.: (602)640-5038

THE EEOC IS CLOSING IT'S FILE ON THIS CHARGE FOR THE FOLLOWING REASON:
(X) We cannot investigate your charge because it was not filed within the time limit required by law.

-NOTICE OF SUIT RIGHTS-

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed WITHIN 90 DAYS from your receipt of this Notice; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

On behalf of the Commission

"s/Charles D. Burtner, District Director

Enclosure(s)
cc: Ogden Deseret Industries

U.S. Equal Employment Opportunity Commission
Phoenix District office

Charles Burtner, District, Director.

Charge No.: 35C-96-0471.

Stan Buck
v.
Ogden Deseret Industries

Case reopened, Right to Sue Rescinded.

DATE:16 June, 1997

Dear Mr. Buck:

This letter is to notify you that the above captioned case has been re-opened pursuant to the EEOC Procedural Regulations, 29 CFR1601.21(b)2(d) and the Right to Sue has hereby been rescinded.

The investigation of the referenced charge will continue and both parties will be contacted by the assigned investigator.

On Behalf of the Commission:
"s/Charles D. Burtner" District Director

cc: Rick Larson, RPC, Ogden Deseret Industries, 2048 Washington Blvd. Ogden, UT 94401

U.S. Equal Employment Opportunity Commission,
Phoenix AZ.

Mr. Buck
1784 East 21st Street
Ogden, UT 84401

Subject: Dismissal of Charge

Charge Number 35C-96-0471

Dear Mr. Buck:

We have completed a review of your case. At this time, the information we have gathered does not indicate that any further investigation of your case would result in any findings of discrimination. This letter, and the enclosed documents, will dismiss your case from further action by the Equal Employment Opportunity Commission (EEOC).

The Phoenix District Office of the EEOC receives thousands of complaints every year. However, we have only limited resources to handle all these charges. We are only able to pursue those cases that show strong and convincing evidence of discrimination.

Our finding is not a statement on the merits of your case. You still have rights under Federal law to privately pursue this matter in Federal Court. We have

enclosed a Dismissal and Notice of Right to Sue form with this letter.

This form will explain your rights. Please note: **you have only 90 days from the date of receipt of this form to file in Federal Court, or you will lose your right to file a lawsuit against your employer**.

Sincerely,

"s/William Ryan"

William Ryan
Enforcement Supervisor

Feb 19 1998

U.S. Equal Employment Opportunity Commission,
Phoenix AZ.

Charge Number 35C-96-0471

EEOC closing its file: unable to establish violations

DATE:19 February, 1998

DISMISSAL AND NOTICE OF RIGHTS

EEOC Representative: William W. Ryan, Supervisor.
Telephone number (602) 640-5012.

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

(X) The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

-NOTICE OF SUIT RIGHTS-

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the

respondent(s) named in the charge. If you decide to

sue, you must sue WITHIN 90 DAYS from your receipt of this Notice. Otherwise you right to sue based on the above-numbered charge will be lost.

Equal Pay Act(EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that back pay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible. (If you file suit, please send a copy of your court complaint to this office.)

On behalf of the Commission

"s/Charles D. Burtner." District Director

Enclosures(s)
cc:Ogden Deseret Industries

U.S. Equal Employment Opportunity Commission,
Phoenix, AZ

Charles D. Burtner, District, Director

Charge No. 35C960471

EEOC did not receive a position statement from the Ogden Deseret Industries.

1 September, 1998

Dear Mr. Buck:

This is in response to your letter dated August 27, 1998 in which you request a copy of the file developed in the charge you filed against Ogden Deseret Industries (Charge No. 35C960471) including a response from the respondent to the allegations raised in the charge.

Our records indicate that your charge was initially filed with the Utah Anti-discrimination and Labor Division on March 19, 1996 and was transferred to the Equal Employment Opportunity Commission (EEOC) in May 1996. Your first request for a Notice of Right to Sue was received in this office in April 1996 before the charge was in our inventory for processing. Therefore, that request for a Notice of Right to Sue was not honored. While you may have verbally requested a Right to Sue at other times, the file is silent on such requests.

We also note that originally this charge was dismissed on April 29, 1997 as not being jurisdictional since it appeared to have been filed in excess of 300 days from the date of the last discriminatory incident. However, that dismissal was revoked when it was determined that a letter sent by you could serve as the original basis for acceptance of a formal charge.

When the file was reopened, we requested a position statement from the respondent, however, we did not receive such a statement and therefore cannot provide you with a copy. This was explained to you by telephone on March 23, 1998.

When this charge was dismissed on February 19, 1998 you received the Notice of Right to Sue along with the dismissal notice. This notice of right to sue was the only such valid notice issued in this charge.

I hope this information is helpful to you but regret there is nothing further the EEOC can do to assist you in this matter.

Sincerely,

"s/Charles D. Burtner" District Director